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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

—against—

JERRY J. CALABRITTO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The New York, New Haven and Hartford Railroad Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above cause on February 21, 1961, affirming a judgment of the United States District Court for the Eastern District of New York in favor of respondent, and respectfully represents:

The Opinions of the Courts Below

There was no opinion written by the trial court. In the Court of Appeals for the Second Circuit, the case was decided by the court in an opinion written by Judge Clark, with separate concurrences written by Judge Waterman and by Judge Friendly. These opinions are not yet officially reported but appear starting at pages 95a and 101a of the printed record (called Appendix), and are appended hereto at pages App. 1-App. 7, App. 7-App. 8 and App. 8-App. 10, respectively.

Jurisdiction

1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

2. The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court, was entered on February 21, 1961. It is appended hereto at pages App. 11 and App. 12.

Statutes Involved

The statutes involved are the Federal Employers' Liability Act of 1908, as amended (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, 45 U.S.C. § 51, as amended by Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404); the Federal Boiler Inspection Act, as amended (Act of Feb. 17, 1911, c. 103, § 2, 36 Stat. 913, 45 U.S.C. § 23, as amended by Act of Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192 and by Act of June 7, 1924, c. 355, § 2, 43 Stat. 659); the Federal Safety Appliance Act (Act of Mar.

2, 1893, c. 196, § 4, 27 Stat. 531, 45 U.S.C. § 4); the Federal Boiler Inspection Act, as amended (Act of Feb. 17, 1911, c. 103, § 2, 36 Stat. 913, as amended by Act of Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; Act of June 7, 1924, c. 355, § 2, 43 Stat. 659; Act of Aug. 14, 1957, Pub. L. 85-135, § 3, 71 Stat. 352, 45 U.S.C. § 34).

The pertinent portions of these statutes are appended hereto at pages 11 and 12.

The Questions Presented

1. May a jury find a railroad employer negligent toward its employee because of a transient condition on one of its locomotives of which it had no actual or constructive notice?

2. May a jury find a violation of the Federal Boiler Inspection Act with respect to a transient condition on a locomotive that did not arise as a result of any mechanical or structural defect?

Summary Statement of the Matter Involved

Respondent was injured on July 19, 1955 at night while working as a brakeman with a yard switching crew in petitioner's West Hump Yard at Cedar Hill, Connecticut. He slipped and fell crossing the front platform of petitioner's yard switching engine as it was slowly pushing cars toward the hump on Track 9.

Respondent carried a standard brakeman's lantern that gave good light, he shone it down ahead of him,

and he could see where he was going and what he was doing (18).* The headlight on the front of the engine was on (18, 41). The floodlights north of Track 9 were also on (18, 39). There was, accordingly, light from three sources at the point where the fall occurred.

Respondent says that he saw "a little sand" there, and also that he saw white brake sand there, around three or four inches deep, of the type used in engine sanders (19). He saw no marks in the sand and no oil (19). Sand for the sanders was stored in the front part of the engine to the right and left of the front headlight, in locations marked on Exhibit A with an arrow and an S (54-55, 84).

Conductor Smith recalled no sand or oil there before the accident but saw some there and on the engineer's side afterward (34, 35). He did not state how much he saw or describe it. Monahan, who was present when respondent was removed after the accident, saw no marks, dirt or grease on respondent's light-colored shirt and pants (41-42). Fireman Fratto saw a little sand but did not slip or fall crossing the front of the engine before the accident, and saw no oil or grease there afterward when helping to pull respondent off, though he did not look for it (56, 64).

After respondent was removed, the engine was taken out of service and a replacement sent to use for the rest of the work (35).

The court charged, without exception, that there "is no claim of mechanical defect" in the engine (76), and there was no proof of any.

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* Numbers in parentheses refer to the pages of the Appendix.

The accident occurred about 12:30 a.m. (36). Respondent had then been working about a half hour (12).

The suit in the case was brought under the Federal Employers' Liability Act and the Federal Boiler Inspection Act. The case was tried before a jury. Defense motions for dismissal of the complaint, direction of a verdict and judgment notwithstanding the verdict was denied. The judgment in favor of respondent was affirmed on appealed.

Specifications of Error

The Court of Appeals for the Second Circuit erred:

1. In affirming the judgment of the District Court.

2. In not reversing the judgment of the District Court and dismissing the complaint for failure of proof.

Reasons Relied on for the Granting of the Writ

Petitioner believes that the writ should be granted for the following reasons:

This case presents important questions of federal law which have never been decided by this Court, and conflicting decisions among state and federal courts.

(a)

On the issue of negligence, there was no proof as to the amount of oil on the front of the engine, the kind of oil it was, where it came from, and how long

before the accident it was there. There was no proof that any one knew of its presence there before the accident. The only positive proof was that some sand with no marks or traces of oil in it was there before respondent was injured, that no one but he slipped on it, and that there was so little oil that respondent's clothes after his fall showed no sign of any.

A jury may not supply proof that is not in the record or speculate as to matters beyond reasonable inference from the established facts.

Moore v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951).

The jury in the case at bar has accordingly found negligence as to a transient condition of which petitioner had no actual or constructive notice, and this it could not properly do under the law as it was charged (77) and as the Court of Appeals in this case recognizes it to be (96).

If a jury is to be allowed to do this, then a revolutionary change in the established law of negligence is being permitted to take place. Such a change should not be accomplished without this Court's passing upon it.

(b)

The second issue in this case presents a question of law not finally determined by this Court: Whether a transient condition not resulting from any mechanical or structural defect in the engine on which it is present constitutes a violation of the Federal Boiler Inspection Act. See the appendix to this petition

for the text of this Act and of the Federal Safety Appliance Act.

The answer to this question depends on whether the dictum in this Court's opinion in *Lilly* v. *Grand Trunk Western R. Co.*, 317 U.S. 481, 487-489 (1943) extending coverage of the Boiler Inspection Act is to be limited to the facts of that case or is to be expanded to a broad, general doctrine.

The opinions of the two concurring judges in the case at bar (101-103) apparently believe themselves bound by a broad interpretation of that dictum, but do so reluctantly and with a plea that the law on this point needs to be clarified by a square-cut decision of this Court.

The *Lilly* case involved a fall by a railroad employee on ice on the top of a locomotive tender. A special I.C.C. regulation required that "Top of tender behind fuel space shall be kept clean and means provided to carry off waste water." This Court interpreted the regulation as requiring "the top of the tender to be kept free of foreign matter which would render footing insecure, for example, coal, dust, debris, grease, waste water and ice" (pp. 486-7), and held that the word "clean" in the regulation meant more than manner of construction or mechanical operation, namely, a "continuing duty of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous" (487).

This Court in the *Lilly* case distinguished but did not overrule the decision of the Court of Appeals for the Second Circuit in *Ford* v. *New York, N. H. &*

H. R. Co., 54 F. 2d 342 (1931), cert. den. 285 U.S. 549, in which considerable cup grease on the grab iron of a locomotive tender was held not to violate the Federal Boiler Inspection Act or the Federal Safety Appliance Act in the absence of proof that the grease got there through some mechanical or structural defect of the locomotive tender. The ground used by this Court to distinguish the *Ford* case was that no I.C.C. regulation was involved there (pp. 487-8).

This same distinction was used by the Court of Appeals for the Third Circuit in *Raudenbush* v. *Baltimore & Ohio R. Co.*, 160 F. 2d 363, 366 (1946) in holding the *Lilly* case not applicable where an employee slipped on snow on the steps of a freight car and claimed a violation of the Federal Safety Appliance Act, and by the highest court of Alabama in *Camp* v. *Atlantic Coast Line R. Co.*, 36 So. 2d 331 (1948) with respect to grease on an engine footboard.

The highest court of Missouri also does not believe these federal acts apply to a transient condition on an engine. *Banta* v. *Union Pacific R. Co.*, 242 S.W. 2d 34 (1951), involving ice on the ladder of a locomotive.

Prior to the *Lilly* case, numerous courts were of the view that only mechanical or structural defects violated these federal acts.

Reeves v. *Chicago, St. P., M. & O. Ry. Co.*, 179 N.W. 689 (Minn., 1920)—coal on steps of engine tender;

Riley v. *Wabash Ry. Co.*, 44 S.W. 2d 136 (Mo., 1931—clinker hook on top of engine tender;

Zachritz v. *St. Louis, S.F. Ry.*, 81 S.W. 2d 608 (Mo., 1935), cert. den. 296 U.S. 584—smooth, oily grab iron on engine;
Tobin v. *Detroit, T. & I. R. Co.*, 13 N.E. 2d 739 (Ohio, 1938)—frost on running board;
Chicago, R.I. & P. Ry. Co. v. *Benson*, 185 N.E. 244 (Ill., 1933), cert. den. 290 U.S. 636—foreign wire on grab iron;
Slater v. *Chicago, St. P., M. & O. Ry. Co.*, 178 N.W. 813 (Minn., 1920).

Basically, the issue involved in this phase of the case at bar is whether a railroad employee should be left to his remedy under the law of negligence as it has been developed under the Federal Employers' Liability Act, or whether he should also be given the advantage of the absolute liability imposed by federal statute; whether a railroad employer is to be held an insurer of the safety of his employees on engines even as to conditions over which it has no control, such as the weather, or whether it is to be held an insurer only as to mechanical and structural defects, which it has at least a reasonable opportunity to control by advance planning, inspection, and design; whether or not Congress ever intended to impose penalty provisions of $250.00 for each violation provided for in 45 U.S.C. §34 to situations of this sort.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT M. PEET,
Attorney for Petitioner.

APPENDIX

Statutes Involved

Section 1 of the Federal Employers' Liability Act of 1908, as amended, 45 U.S.C. § 51, reads in part as follows:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . resulting in whole or in part from the negligence . . . of such carrier . . . ."

Section 2 of the Federal Boiler Inspection Act, as amended, 45 U.S.C. § 23, reads in part as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, ..."

Section 4 of the Federal Safety Appliance Act, 45 U.S.C. § 4, reads as follows:

> "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides

of each car for greater security to men in coupling and uncoupling cars."

Section 9 of the Federal Boiler Inspection Act, as amended, 45 U.S.C. § 34, reads in part as follows:

> "Any common carrier violating the provisions of sections 22-34 of this title relating to locomotives, their boilers, tenders, and so forth, or any rule or regulation made under such provisions or any lawful order of any inspector shall be liable to a penalty of $250 for each and every such violation, . . ."

APPENDIX

Opinion Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 98—October Term, 1960.

(Argued December 7, 1960

Decided February 21, 1961.)

Docket No. 26222

JERRY J. CALABRITTO,

Plaintiff-Appellee,

—v.—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant-Appellant.

Before:

CLARK, WATERMAN and FRIENDLY,

Circuit Judges.

Appeal from the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge.*

The New York, New Haven and Hartford Railroad Company appeals from a verdict and judgment in favor of Jerry J. Calabritto for $25,000 and costs in his action for damages for personal injuries. Affirmed.

Opinion Court of Appeals

ROBERT M. PEET, New York City (Edmund J. Moore, New York City, on the brief), *for defendant-appellant.*

WILLIAM PAUL ALLEN, New York City, *for plaintiff-appellee.*

CLARK, *Circuit Judge*:

Plaintiff, suing under the Federal Employers' Liability Act, 45 U.S.C. §§51-60, and the Boiler Inspection Act, 45 U.S.C. §23, recovered a verdict and judgment for $25,000 and costs for the injuries he sustained in the course of his work for defendant as a yard brakeman when he slipped and fell on sand and oil located on the platform on one of defendant's switching engines. Under the court's charge the jury was directed to find for the plaintiff if the defendant had been negligent or if it had failed to keep its locomotives in the safe condition required by the Boiler Inspection Act. Defendant now appeals on the grounds that there was insufficient evidence to support a finding of negligence under the FELA and that the FBIA does not impose liability for dangerous conditions created by the temporary presence of foreign matter on its locomotives.

We conclude that there was sufficient evidence to justify submission of the case to the jury on the issue of negligence. By his own testimony the yard conductor, on discovering plaintiff lying unconscious on the engine platform, noticed that sand and oil were present on the front end of the deck. Plaintiff testified that he saw sand in the area, and the fireman testified that he saw sand there in making his routine

check of the engine prior to the accident. On this record the jury could find that the railroad, through its employees, either knew or should have known that a dangerously slippery condition existed in the area where plaintiff would pass in the course of his duties. Unless there is a complete absence of probative facts to support the conclusion reached, the jury verdict must stand. *Korte* v. *New York, N. H. & H. R. Co.*, 2 Cir., 191 F. 2d 86, 88, certiorari denied *New York, N. H. & H. R. Co.* v. *Korte*, 342 U.S. 868; *Schilling* v. *Delaware & H. R. Corp.*, 2 Cir., 114 F. 2d 69, 71. The sustained efforts of the Supreme Court majority to preserve the integrity of the jury system, over vigorous dissent that the time taken with these cases was not well spent, show that this verdict is not to be upset. See e.g., *Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500, 524, 559; *Gibson* v. *Thompson*, 355 U.S. 18.

Defendant's second contention is that the FBIA, 45 U.S.C. §23, imposes liability only for mechanical or structural defects, and not for dangerous conditions caused by the temporary presence of foreign matter. But the statute itself contains no such limitation, and instead requires all locomotives and their parts and appurtenances to be "in proper condition and safe to operate * * * without unnecessary peril to life or limb." Furthermore, the Supreme Court expressly rejected such a narrow reading of §23 in *Lilly* v. *Grand Trunk Western R. Co.*, 317 U.S. 481, 487-488.[1]

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[1] "From various cases denying recovery under the Act, respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter. But there is no warrant in the language of the Act for construing it so narrowly, or for denying the Commission power

In the *Lilly* case the plaintiff had suffered injuries in a fall from the top of a locomotive tender which had become icy in violation of a rule of the Interstate Commerce Commission. Sustaining a jury verdict for plaintiff the Supreme Court said: "The use of a tender, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated." 317 U.S. 481, 486. So the use of an engine whose surface has been made slippery by sand and oil may similarly be found by a jury to involve "unnecessary peril to life or limb" in violation of the FBIA.

Defendant contends that the *Lilly* case authorizes recovery for nonstructural or nonmechanical defects only where the dangerous condition results from a violation of an ICC rule. In *Lilly* the Court, after rejecting the argument that §23 did not extend to such defects, referred to certain of the early cases denying liability on which the defendant here also relies,[2] and stated that "[w]hatever else may be said about the cases relied upon by respondent, they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation." *Id.* at 488. But the Court also stated that the

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to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment 'in proper condition and safe to operate . . . without unnecessary peril to life or limb.' Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb."

2 *Ford* v. *New York, N. H. & H. R. Co.*, 2 Cir., 54 F. 2d 342, certiorari denied 285 U. S. 549 (grease on locomotive grab iron); *Reeves* v. *Chicago, St. P., M. & O. Ry. Co.*, 147 Minn. 114, 179 N. W. 689 (coal on engine steps); *Riley* v. *Wabash Ry.*, 328 Mo. 910, 44 S. W. 2d 136 (clinker hook on top of engine tender).

jury could have found a violation of §23 in the absence of such a rule. *Id.* at 486, 489. The requirement of safe equipment is set by the statute, not by the rule.[3] While the Commission has the power to give more definite content to this standard in specific instances by rules, the failure of the Commission so to act does not relieve a carrier of its obligation to meet the statutory requirement of safe equipment as it may be reasonably interpreted by a jury.[4] If the Commission had enacted a rule requiring engine platforms to be kept clear of slippery substances, clearly the jury could have concluded that an engine platform made slippery by sand and oil was in an unsafe condition within the meaning of §23. The absence of such a rule, which would only be declaratory of common sense, can make no difference to the jury's right to reach such a conclusion. It would be indeed an anomaly to require enforcement of a Congressional mandate for safe railroad equipment to depend upon the action or nonaction of an administrative agency.

We find no persuasive authority since the *Lilly* case to support the narrow construction of §23 for which defendant contends. Defendant relies on *Raudenbush* v. *Baltimore & O.R. Co.*, 3 Cir., 160 F. 2d. 363, where the Third Circuit, distinguishing *Lilly* as relying on a Commission rule, held that the requirement of "secure sill steps" in 45 U.S.C. §11 referred only to mechanical

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[3] See *Bolan* v. *Lehigh Valley R. Co.*, 2 Cir., 167 F. 2d 934, 936; *O'Brien* v. *Chicago & N. W. Ry.*, 329 Ill. App. 382, 68 N. E. 2d 638, 646-648.

[4] See *Delevic* v. *Reading Co.*, 3 Cir., 176 F. 2d 496, 497; *Baltimore & O. R. Co.* v. *Groeger*, 6 Cir., 288 F. 321, 324, reversed on other grounds 266 U. S. 521; Richter & Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13, 47.

and structural defects, and was not applicable where an employee fell on newly fallen snow. But the applicability of §23, which had been ruled out of the case by the district court, was not considered on appeal. Furthermore, in a later opinion by the Third Circuit in *Terek* v. *Conemaugh & Black Lick R. Co.*, 3 Cir., 231 F. 2d 564, 567, where plaintiff alleged but failed to prove that he fell on a slippery foreign substance, the court accepted without dispute plaintiff's contention that "the defendant railroad would be responsible [under §23] for injury caused by a foreign substance on the floor of its locomotive regardless of fault." In that case, as in *Delevie* v. *Reading Co.*, 6 Cir., 288 F. 321, interrogatories were submitted to the jury inquiring whether a slippery foreign substance had made footing unsafe—a factor suggesting that trial courts in the Third Circuit consider such substances as creating liability under §23. Defendant also relies on *Camp* v. *Atlantic Coast Line R. Co.*, 251 Ala. 184, 36 So. 2d 331, which refused to find liability under §23 where there was doubt that the fall was caused by grease as alleged and where the grease may well have come from plaintiff's own shoes. Even that case, however, recognized that the Act would be violated if a locomotive were made unsafe "because of the presence of dangerous objects of foreign matter." 251 Ala. 184, 36 So. 2d 331, 335.

We think the sounder view is represented by cases holding that dangerous conditions caused by foreign substances give rise to liability under §23. In *Minehart* v. *Southern Pac. Co.*, 136 Cal. App. 2d 486, 288 P. 2d 999, liability under §23 was imposed on the authority of *Lilly* for a locomotive ladder made greasy by oil. In *Zumwalt* v. *Gardner*, 8 Cir., 160 F. 2d 298,

304, the jury was permitted to find for the plaintiff if it concluded that dirt was present in the equipment controlling the brakes. In *Atlantic Coast Line R. Co. v. Sweat*, 5 Cir., 183 F. 2d 27, §23 was violated when a piece of waste in the water tank caused a boiler explosion. In *Tisneros* v. *Chicago & N. W. Ry.*, 7 Cir., 197 F. 2d 466, certiorari denied 344 U.S. 885, the trial court concluded that an icy condition of steps and grab irons could be "an unnecessary peril to life or limb" under §23, but the court of appeals reversed on another ground without ruling on this issue.

It is clear that a permanently slippery surface would constitute unsafe equipment under 45 U.S.C. §23. *Bolan v. Lehigh Valley R. Co.*, 2 Cir., 167 F. 2d 934; *Louisville & N. R. Co. v. Botts*, 8 Cir., 173 F. 2d 164. For the reasons stated, we do not think the statute authorizes a different result simply because the dangerous condition is created by the presence of grease and oil.

Judgment affirmed.

Concurring Opinions Court of Appeals

WATERMAN, *Circuit Judge* (concurring):

I concur in the result and join my colleagues in affirming the judgment. In the light of *Lilly* v. *Grand Trunk Western R. Co.*, 317 U.S. 481, 487-88 (1943), the trial court's charge to the jury with reference to plaintiff's claim of defendant's liability to him under the Boiler Inspection Act, 45 U.S.C. §23 was not erroneous. Until that decision is clarified a trial court is justified in charging the jury that the presence of

any unstable foreign substance on the exterior of a locomotive, irrespective of how the substance came to be there, conclusively establishes that the railroad, as when a defective boiler explodes, has negligently violated its duty to its employees of providing them with safe places in which to work.

Like Judge Friendly, I arrive at this result with great reluctance, and if I did not consider ourselves bound by the language in *Lilly* v. *Grand Trunk Western R. Co., supra,* I would reverse and remand for a new trial.

FRIENDLY, *Circuit Judge* (concurring):

The language of the Boiler Inspection Act, 36 Stat. 913, §2 (1911), 45 U.S.C. §23, does not suggest to me a Congressional purpose to impose on railroads an absolute duty to keep the surfaces of locomotives and tenders as free from foreign matter at all times as an operating room before surgery. If the Act does this, I see no way of limiting the requirement to such substances as oil and grease; it must extend also to substances as unavoidable in railroad operation as snow and ice. Such a construction means that railroads face an inevitable conflict between the duty thus imposed, carrying the sanction of a $250 penalty for "each and every such violation," 45 U.S.C. §34, as well as of liability to employees, and their duty to render reasonable service to passengers and shippers; if the New Haven chose to regard the former as paramount, there would, I fear, be many occasions during the New England winter when we would be bereft of the presence of our colleagues from Connecticut and Vermont. Neither does anything in the legislative

history of the Act afford the slightest basis for such a construction; indeed, it points rather in the opposite direction.[1] If I were free to exercise my own judgment, I should therefore wholly agree with the interpretation given by this Court in *Ford* v. *New York, New Haven & Hartford R. Co.*, 54 F. 2d 342 (2 Cir. 1931), where we affirmed the dismissal of a complaint based on the theory that the mere presence of a foreign substance violated the Safety Appliance and Boiler Inspection Acts.

Against this we now have *Lilly* v. *Grand Trunk Western R. Co.*, 317 U.S. 481, 487-88 (1943). That opinion seems to me to shift rather uneasily between the extreme position urged by the plaintiff and em-

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[1] The initial debate on the floor of the House indicated that the legislators were primarily concerned with boiler explosions. Representative Mann, chairman of the House Committee on Interstate and Foreign Commerce, which reported the bill, said "It is the belief of all people concerned, both the railroads and the employees, that the passage of this bill will materially result in the lessening of boiler explosions." 46 Cong. Rec. 2071 (1911). Representative Robinson spoke of accidents caused by "defective boilers," *id.* at 2072, and Representative Peters of explosions, steam pressure, and the need to inspect boilers from the inside, *id.* at 2074.

The broadening of the Act in 1915 was recommended by the Senate Committee on Interstate Commerce in a one-page report, S. Rep., 63rd Cong., 3d Sess., No. 1068, which said only:

> "This measure provides for the inspection of the entire locomotive. Experience has shown that this is necessary and desirable for the proper safeguarding of the lives of those who travel and of those engaged in the operation of locomotives."

The House Report on the 1924 amendment, 68th Cong., 1st Sess., No. 490, reprinted a letter from the Interstate Commerce Commission which spoke in passing of accidents "resulting from the failure of some part of appliance of the locomotive or tender." P. 3. The Senate Report, No. 740, simply reprinted the House report with approval.

bodied in the judge's instruction here, and a narrower holding based on Interstate Commerce Commission Rule 153. If that decision were our own, I would limit it to the latter ground, see *Urie* v. *Thompson*, 337 U.S. 163, 191 (1949), believing that any incongruity in having the standard of liability differ according as a practice with respect to locomotives and tenders was or was not required by a rule of the Interstate Commerce Commission was less undesirable than having the standard differ as between the locomotive and tender on the one hand and rolling stock covered by the Safety Appliance Act on the other, see *Raudenbush* v. *Baltimore & Ohio R. Co.*, 160 F. 2d 363 (3 Cir. 1947), or as between railroad power plants and those of competitive carriers by land and air who are subject to a liability to their employees that is absolute but limited. However, when the precedent is a decision of the Supreme Court, our handling must be more literal; despite my own belief that the result goes beyond any purpose signified by Congress, I think the interpretive scale comes down slightly on the side that the *Lilly* opinion went all the way Judge Clark says. I concur for affirmance solely on that ground; for if the charge with respect to the Boiler Inspection Act was in error, a new trial would be required despite the correctness of the instruction and the adequacy of the evidence under the Federal Employers Liability Act, *United New York and New Jersey Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 619 (1959).

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of February one thousand nine hundred and sixty-one.

Present: HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY, *Circuit Judges.*

JERRY J. CALABRITTO,

Plaintiff-Appellee,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for

the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

Endorsed:

United States Court of Appeals, Second Circuit

Filed February 21, 1961

A. DANIEL FUSARO, Clerk

Stipulation and Order Staying Issuance of Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 26222

JERRY J. CALABRITTO,

Plaintiff-Appellee,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant-Appellant.

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the issuance of the mandate of the United States Court of Appeals for the Second Circuit in the above-entitled action be stayed for a period of thirty days from March 8, 1961 and that

Stipulation and Order Staying Issuance of Mandate

an order so staying the issuance of the mandate be entered without further notice.

Dated: New York, N.Y.
March 1, 1961.

WILLIAM PAUL ALLEN
Attorney for Plaintiff-Appellee

EDMUND J. MOORE
Attorney for Defendant-Appellant

SO ORDERED:

Dated: New York, N.Y.
March 3, 1961.

HENRY FRIENDLY
United States Circuit Judge

Supreme Court of the United States

October Term, 19[illegible]

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

AGAINST

JERRY J. CALABRITTO,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent asserts that the petition presents no adequate or sufficient reason for the granting of a Writ of Certiorari.

The Case History

Respondent, a yard brakeman, employed by the railroad company (petitioner) was injured on July 20, 1955. A complaint under the Federal Employers' Liability Act (45 U. S. C. A. §§51-60) and the Federal Boiler Inspection Act (45 U. S. C. A. §§17-34) was filed on January 27, 1956, in the United States District Court for the Eastern District of New York. A note of issue was filed February 23,

1956, and the case was finally reached for trial before Judge Bruchhausen and a jury on February 23, 1960.

Trial was continued on February 24, 25, 26 and 29. The case was submitted to the jury by Judge Bruchhausen on both of the aforementioned Statutes. The jury returned a general verdict for the plaintiff for $25,000. Counsel made no motion to set aside the verdict as contrary to the evidence or against the weight of the evidence or that it was excessive.

An appeal was taken to the United States Court of Appeals for the Second Circuit and was argued on December 7, 1960. The Court filed its decision on February 21, 1961. The main opinion was written by Judge Clark with concurring opinions by Judges Waterman and Friendly. Almost six years have elapsed since the respondent was injured.

Statement of Facts

Respondent, a brakeman, reported for work at 11:55 p.m., daylight saving time, on July 19, 1955, at the yardmaster's office at the Cedar Hill Yard of the petitioner at New Haven (12, 13).* Yardmaster Arthur Wasserman (33, 66) assigned him as head brakeman on a switching crew to classify cars in the West Hump in said yard (12, 53, 61).

After making a couple of small moves the switching crew coupled to a drag of cars on Track 9 and pushed them westward over the hump (13, 14). Conductor Albert D. Smith directed plaintiff to throw certain switches and then ride the engine to the top of the hump where the

* Unless otherwise specified, page references are to Appellant's Appendix

conductor was stationed (14, 32). In accordance with the conductor's orders respondent threw these switches and then got on the engine on the south side at the east or rear end thereof (14, 15). He passed through the cabin, and went out the door on the fireman's side to the catwalk or runway which extended along the south or fireman's side of the engine (14). He proceeded westward and, when he reached the front or west end of the engine, he turned to his right to cross to the north side on the platform of the engine (15, 16).

He noticed sand on the platform but nothing else (16, 19). As he took a step along the front platform "both feet went from under me all at once", and he fell to the platform landing on his back with his head toward the north (16, 32, 33, 58, 66). He was rendered unconscious and continued unconscious for some time (16, 33, 69).

When the engine approached conductor Smith, who was standing at the top of the hump (32), he saw respondent lying on his back on the front platform with his head to the north (33). He immediately hollered over the loudspeaker "A man was hurt" (33). He, fireman Fratto, engineer Doolittle and yardmaster Wasserman put respondent on a stretcher, which yardmaster Wasserman had brought, and carried him to the rear deck of the engine and the engine carried respondent, still unconscious, to Rock Street, Cedar Hill (33, 34, 66, 67, 68) where he was transferred to an ambulance which took him to the New Haven Hospital.

Conductor Smith testified that when he assisted in removing respondent from the platform, he found that there was sand and oil on the said platform (34). The engine was taken out of service at Cedar Hill and another engine furnished to complete the work (34, 68).

Fireman Fratto reported for work at 11:55 p.m., daylight saving time, on July 19, 1955 (53, 60). Before he started to work he checked the engine over, as was his duty, and found sand on the front platform but did nothing about it although it was his duty "to see if there is anything wrong with it" (54, 64). When he assisted in removing respondent from the platform, Fratto saw sand on said platform but did not remember seeing any oil or grease nor did he look for any (64).

The accident to respondent occurred at 12:30 a.m. standard time, or 1:30 a.m. daylight saving time, on July 20, 1955 (36). This was at least one and one-half hours after fireman Fratto had checked the engine and found sand on the front platform.

Petitioner excused its failure to call engineer Doolittle because Doolittle had had surgery and could not come to court. Petitioner, however, gave no excuse for its failure to call yardmaster Arthur Wasserman who was in charge of the yard, brought the stretcher to the engine and knew that respondent was still unconscious when sent to the hospital. Undoubtedly it was he who took the engine out of service and ordered a replacement.

Answering the Questions Presented by Petitioner

The questions presented on this petition for a Writ of Certiorari are stated on page 3 as follows:

"1. May a jury find a railroad employer negligent towards its employee because of a *transient* condition on one of its locomotives of which it had no actual or constructive notice?" (Italics ours.)

"2. May a jury find a violation of the Federal Boiler Inspection Act with respect to a *transient* condi-

> tion on a locomotive that did not arise as a result of any mechanical or structural defect?" (Italics ours.)

As we read the dictionaries, the synonyms for the word "transient" are temporary, fleeting, passing quickly. That the oil on the platform was not "transient" is clear from the evidence. At 11:55 p.m. on July 19, 1955, fireman Fratto before he started to work checked the engine over and found sand on the front platform but did nothing about it although it was his duty "to see if there was anything wrong with it" (54, 64).

Sand is not placed on a locomotive platform unless there is need therefor.

The accident occurred at 1:30 a.m. daylight time on July 20, 1955, at which time conductor Smith testified he saw sand and oil on the platform. This was at least one and a half hours later than Fratto's inspection. And then the engine was taken out of service, undoubtedly because it was not safe to operate.

It is most imaginative to call the condition shown by the evidence, a "transient" condition.

Answering Petitioner's Reasons for Granting the Writ

These reasons are stated on page 5 of the petition and read as follows:

> "This case presents important questions of federal law which have never been decided by this Court, and conflicting decisions among state and federal courts."

We assert there is no question presented in the case that has not been decided by this Court.

(a)

Answering subdivision (a) (petition, p. 5), we refer to respondent's "Statement of Facts" and argument under "Answering the Questions Presented by Petitioner" on the issue of negligence under the Federal Employers' Liability Act. In this argument of petitioner again the words "transient" condition are used.

As to the question of notice to the railroad of any dangerous condition, Judge Bruchhausen charged the jury as follows (77):

> "You may not find the railroad responsible unless you find that the sand and oil as claimed by the plaintiff was on the platform for such a length of time that the defendant knew or should have known of its presence."

As to speculative evidence, for which petitioner cites *Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951), Judge Bruchhausen charged as follows (81):

> "Your deliberations should be on the evidence, not upon any speculative or conjectural means."

These instructions were clear and specific and it must be concluded that the jury's verdict followed such instructions.

In his opinion (Petition—App. 3) Judge Clark, referring to liability under the Federal Employers' Liability Act, states as follows:

> "On this record the jury could find that the railroad, through its employees, knew or should have known that a dangerous slippery condition existed in the area where plaintiff would pass in the course of his duties. Unless there is a complete absence of probative facts to support the conclusion reached, the jury verdict must stand."

Judges Waterman and Friendly fully agreed with this conclusion of Judge Clark.

(b)

Petitioner claims that the case presents a question of law not *finally* determined by this Court, whether a *"transient"* condition not resulting from mechanical or structural defect of an engine on which it is present constitutes a violation of the Federal Boiler Inspection Act (Italics ours).

Petitioner then contends that the answer to this question depends on whether the *dictum* in this Court's opinion in *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481-489 (1943), is to be considered as a broad general doctrine.

The language in the *Lilly* case is not a *dictum*. At page 485 of the opinion this Court said:

> "Negligence is not the basis for liability under the Act. Instead it 'imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate * * * without unnecessary peril to life or limb' (citing cases). Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal

> **Employers' Liability Act, charging the violation of the Boiler Inspection Act (citing cases). The Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment (citing cases).''**

At page 486 this Court said:

> "The use of a tender, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated."

And again on page 487 this Court said:

> "From various cases denying recovery under the Act, respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous object or foreign matter. But there is no warrant in the language of the Act for construing it so narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment 'in proper condition and safe to operate * * * without unecessary peril to life or limb'."

In his opinion in this case, Judge Clark states definitely that in the *Lilly* case this Court expressly rejected a narrow reading of §23 of the Boiler Inspection Act and quotes from the *Lilly* case as set forth above.

Both the concurring judges believe the law applicable to the case is decided by the *Lilly* case and agree completely with Judge Clark's opinion.

We cite a few of the cases supporting the *Lilly* decision:

Urie v. *Thompson*, 337 U. S. 191 (1949);
Baltimore & Ohio R. Co. v. *Jackson*, 353 U. S. 325, 329 (1957);
Kernan v. *American Dredging Co.*, 355 U. S. 424, 426, 444 (1958);
Bolan v. *Lehigh Valley R. Co.*, 167 F. 2d 934, C. C. A. 2 (1948);
Louisville & N. R. Co. v. *Botts*, 173 F. 2d 164, C. C. A. 8 (1949).

In his opinion Judge Clark also distinguishes various cases cited by petitioner, namely:

Ford v. *N. Y. N. H. & H. RR. Co.*, 54 F. 2d 342, cer. den. 285 U. S. 549 (C. C. A. 2d 1931);
Raudenbush v. *B. & O. R. Co.*, 160 F. 2d 363 (1946);
Camp v. *Atlantic Coast Line R. Co.*, 36 So. 2d 331 (1948);
Reeves v. *Chicago, St. P. M. & O. Ry. Co.*, 147 Minn. 114, 179 N. W. 689;
Riley v. *Wabash Ry. Co.*, 44 S. W. 2d 136 (Mo. 1931).

Respondent respectfully submits that there is no question presented in the case that has not been decided by this Court in the *Lilly* case.

The case comes within both the Federal Employers' Liability Act and the Federal Boiler Inspection Act. The

jury was clearly and specifically instructed by Judge Bruchhausen as to both these Acts, as well as to speculative evidence and actual or constructive notice.

The Court of Appeals was unanimous in its decision for respondent.

Respondent respectfully submits, therefore, that the verdict of the jury and the opinion of the United States Court of Appeals are justified under both Acts.

The Writ Should Be Denied.

Respectfully submitted,

WILLIAM PAUL ALLEN,
Attorney for Respondent.